Group Identities and Human Rights: How Do We Square the Circle in International Law?

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The identity of groups of an ethno-cultural variety has long fallen within the remit of international human rights law. In this context, discussions have been largely concerned with the legal status of groups and/or the nature of the legal right(s) in question. While acknowledging the importance of these dimensions, in this article I seek to provide an alternative account by discussing the continuities and discontinuities in articulating the very concept of group identity. I first examine the potential, limitations and eventual hybridity of human rights practice across the spectrum of minority/indigenous identities. Then, I critique a range of instabilities in human rights discourse relating to the idea of group identities, their personal scope and the role of international law. I argue that such instabilities do not merely mirror the ambivalent outlook of the relationship between human rights and group identities; they raise the broader question of whether there is a relatively more coherent way to capture the legitimacy of group claims. I conclude by pointing to the outer limits of identity claims, the understated interplay of sovereignty and inter-group diversity, and the need to unpack the reasons why certain groups merit protection in the way they do.

I. Introduction: Ethno-Cultural Identity as a Human Rights Concern

From the proliferation of indigenous claims to land and natural resources to European anxieties about national belonging and the challenge of migration to attempts to bring several ethnic or sub-national conflicts to an end, the theme of group identities of a cultural variety has recently rekindled public discourse in a number of significant ways. Yet, the collective story of ethno-cultural identities goes much further back in time to a point where the articulation and defence of those identities, or some of them, becomes deeply entangled with the very existence and functioning of states as we know them today.[1])

This article examines one important dimension of this broader phenomenon: the conceptual continuities and discontinuities in articulating ethnic, linguistic and/or religious identities within international human rights law. The role of ethno-cultural group identities in this context has been largely shaped by discussions about the legal status of groups and/or the nature of the right(s) in question. Despite the importance of these dimensions, it has not been uncommon for them to appear as obstacles to, rather than opportunities for, a deeper understanding of the field. The following sections seek to develop an alternative account by looking at selective dimensions of human rights practice across the spectrum of minority/indigenous identities and what their comparative outlook tells us about the concept of group identities in international law.[2]) I will first capture a range of developments affecting ethno-cultural identities (subsection II.A), followed by an assessment of the uncertainties and potential of human rights discourse (subsections II.B and II.C). Then, I will provide a critique of the conceptual instabilities of such discourse by discussing prominent narratives that question, directly or indirectly, the legitimacy of group interests, the ability of international law to relate meaningfully to group identities and/or its ability to do so in distinctive ways (section III.). Finally, I will argue that the ever-expanding body of practice in the field is

1) For several strands of this debate, see *G. Pentassuglia* (ed), Ethno-Cultural Diversity and Human Rights: Challenges and Critiques, Leiden: Martinus Nijhoff Publishers, forthcoming; *G. Pentassuglia*, Self-Determination, Human Rights, and the Nation-State: Revisiting Group Claims through a Complex Nexus in International Law, International Community Law Review 19, 2017.

2) I will mainly deal with cross-cutting dimensions of protection regarding "national minorities" or "minorities" and "indigenous peoples" and will assume some basic starting points concerning the protection of such groups against genocide or other international crimes. The comparative thrust of the analysis moves beyond compartmentalized visions of the field in order to explore synergies and tensions within human rights discourse and to recognize (conceptually at least) the correlation between legal classifications and historical contingencies (for commentary from a broader angle, see eg The International Law of Nationalism: Group Identity and Legal History, in International Law and Ethnic Conflict, ed *D. Wippman*, Ithaca and London: Cornell University Press, 1998, 25).

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not only cause to rejoice but should also give us pause to reflect on the normative purposes of human rights interventions in relation to group identities. I will point to the outer limits of identity claims, the understated interplay of sovereignty and inter-group diversity, and the need to unpack the reasons why certain groups merit protection in the way they do (section IV.).

II. Group Identities and International Human Rights Law: A Bumpy Road to Somewhere

II.A Tracing Developments: A Selective Account

That the sort of group identities considered in this article have been traditionally associated with the notion of equality is not at all surprising. As early as 1935, the Permanent Court of International Justice held that combining "perfect equality" (equality in law) within the political community with the protection of cultural differences brought about by the minority population within the state would lead to "true equality" between the majority and the minority, including most notably securing the minority's own institutions.[3]) What was relatively predictable (yet innovative) in the pre-human rights era driven by the 1919 Versailles settlement became almost entirely unpredictable in an area (post–1945) where the language of human rights was essentially meant to replace, rather than augment, the international legal protection of group identities.

In this sense, the recent renewal in equality-based group protections is undoubtedly remarkable. A few brief examples can illustrate the point. Both the Inter-American human rights bodies (Court and Commission) and the African human rights structures under the African Charter on Human and Peoples' Rights (ACHPR) have increasingly worked on the premise that there is something inherently unfair or unjust in the way that the groups concerned have been treated in matters of land title and natural resources, cultural identity as well as wider participation in public life. The Inter-American Court, in particular, has treated the standard of non-discrimination in this context as a fundamental basis for progressive readings of indigenous rights.[4]) For its part, the European Court of Human Rights has engaged in a major re-conceptualization of Article 14 of the European Convention on Human Rights (ECHR) that is focused on the effects of seemingly neutral measures adopted by the state on certain religious or ethnic groups. The notion that "a general policy or measure that has disproportionately prejudicial effects on a *particular group* may be considered discriminatory notwithstanding that it is not specifically aimed at that group"[5]) has reverberated through several cases in which claims of indirect discrimination against Roma groups generated a platform for a groundbreaking reflection on some form of substantive and procedural inter-group equality.[6])

Whether it is through the notions of "equality in fact", "indirect discrimination", "full and effective equality" and/or "positive action",[7]) it now seems rather undisputed that the expansion of the scope of equality in recent human rights case law and legislation requires domestic authorities to evaluate the real or potential impact of public policies on the position of particular groups (including, for example, in matters of language or education) and whether there is a need for corrections and improvements, or even (narrowly construed) forms of "reasonable accommodation".[8]) As implied by the 1992 UN Declaration on the Rights of National or Ethnic, Religious and Linguistic Minorities (Articles 4(2) and 8(3)), state-generated special arrangements for all or specific minority groups are presumed to be compatible with the principle of equality, subject to a challenge on proportionality grounds.[9])

Apart from articulating group issues through the lens of anti-discrimination law, group identities are most obviously integral to discussions about the scope of cultural protections in human rights law. For example, the Inter-American Court on Human Rights has developed its multidimensional jurisprudence on indigenous rights on the basis that indigenous communal property under Article 21 of the American Convention on Human Rights (ACHR) must be grounded in a broader and conceptually "transversal" right of indigenous communities to culture, particularly the identity and spirituality tied to traditional indigenous lands and resources.[10])

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3) Minority Schools in Albania (Advisory Opinion), 6 April 1935, P.C.I.J. Series A./B., No. 64, 3.

4) See eg Yakye Axa Indigenous Community v. Paraguay, Judgment of 6 February 2006, Series C, No. 125 (2005), para. 51; The Saramaka People v. Suriname, Judgment of 28 November 2007, Series C, No. 172 (2007), para. 103. For similar readings under the ACHPR, see Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Comm. No. 276/2003, 4 February 2010, para. 149; Advisory Opinion of the African Commission on Human and People's Rights on the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the African Commission on Human and Peoples' Rights at its 41st session, Accra, Ghana, May 2007, para. 19. For a similar line from the African Court on Human and People's Rights, see recently African Commission on Human and Peoples' Rights v. Republic of Kenya, App. No. 006/2012, Judgment of 26 May 2017 (hereinafter, the Ogiek case).

5) Kelly v. United Kingdom, App. No. 30054/96, Judgment of 4 May 2001, para. 154 (emphasis added).

6) For commentary, see *G. Pentassuglia*, The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?, International Journal on Minority and Group Rights 19, 2012, 1 at 6–7, 12–13.

7) *Supra* notes 3 and 4; Framework Convention for the Protection of National Minorities (FCNM), 1 February 1995, CETS No. 157, Article 4(2); Committee on the Elimination of Racial Discrimination, The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination, General Recommendation No. 32 adopted by the Committee on the Elimination of Racial Discrimination at its 75th session, 24 September 2009, UN Doc. CERD/C/GC/32 (2009); Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L180/22, Article 5.

8) For the concept of "reasonable accommodation" in Canadian legislation and case law, see *J. Woehrling*, L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse, McGill Law Journal 43, 1998, 325.

9) Judicial practice reflects this line of thinking by upholding the overall legitimacy of the arrangement, arguing against its withdrawal and/or criticizing particular aspects of it. See G. *Pentassuglia*, Minority Groups and Judicial Discourse in International Law: A Comparative Perspective, Leiden: Martinus Nijhoff Publishers, 2009, 149–180.

10) The Kichwa Indigenous People of Sarayaku v. Ecuador, Judgment of 27 June 2012, Series C, No. 245 (2012), para. 213; Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of 31 August 2001, Series C, No. 79 (2001).

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Crucially, it has noted that the connection between land and (indigenous) culture should be taken as a particular articulation of an underlying right to "cultural identity" grounded in the "collective dimension of the cultural life of native, indigenous, tribal and minority peoples and communities".[11]) In a similar vein, Article 27 of the International Covenant on Civil and Political Rights (ICCPR) affirms rights of cultural integrity to the benefit of ethnic, religious and linguistic minority groups, which encompass but are not limited to indigenous ways of life associated with the use of land and its resources. Together with other leading global and regional human rights instruments,[12]) this body of practice has resulted in converting the cultural rights-based argument into a discussion about the extent to which particular state measures impact the level of cultural access and enjoyment for the group and/or the cultural rights and interests of non-members and dissenting members within the group.[13])

To the extent that group identities are treated solely as cultural issues, one can hardly deny the broad resonance of this approach with a variety of individuals and communities. The European Court of Human Rights, for instance, has recognized cultural pluralism as an important value to be protected under the ECHR, for the sake of particular groups and society as a whole, in the context of narrower or broader aspects of minority and majority identity.[14]) It has effectively called for relevant general and particular decision-making processes to be able to respond to particular groups' practices in ways that are consistent with an underlying entitlement to cultural recognition.[15]) In many ways, this is part of the background to the recent rise of cultural rights as exemplified by General Comment 21 adopted in 2009 by the Committee on Economic, Social and Cultural Rights, which is charged with overseeing compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR).[16]) In providing a coherent account of the right to take part in cultural life set out in Article 15(1)(a), the Committee employs an expanded and dynamic (anthropological) concept of "culture" to include ways of life, language and other manifestations of relevance to individuals, groups of individuals and communities, including (among others) "minorities", "migrants" and "indigenous peoples".[17]) All of them are regarded as being entitled to core rights of choice, non-discrimination and participation in relevant decision-making.[18])

Although there is an inevitably cross-cutting dimension to group cultural interests, some of them actually blend with very specific claims to political and legal authority. The latter's conceptual (and legal) thrust can be traced back to early "national" self-determination claims made against the domination of European empires or early articulations of claims to indigenous self-government levelled against settler states' colonization. In the aftermath of the First World War, United States President *Woodrow Wilson's* commitment to the recognition of new states in "indisputably" national territories[19]) proved only part of a wider treaty-based and institutional structure designed to empower international law over and above other sources of authority, whether state or nation, in addressing inter-group diversity issues from within the system, including a measure of group autonomy.[20]) In the second post-war period, the reformulation of the right to self-determination as a human right – indeed, as a fundamental precondition for the enjoyment of human rights as such – first became primarily synonymous with independence within colonial (predefined) boundaries and later on began to be further reconfigured in connection with broader notions of participation and recognition of group diversity within established states.[21])

In fact, self-determination's entrenchment in common Article 1 of the UN Covenants on Human Rights, coupled with a string of developments in distinct areas of group protection (minority and indigenous rights featuring prominently among them), have gradually added to postcolonial extensions of the concept by viewing specific forms of "effective" participation in, or control over, decision-making processes as the most significant ways of enriching the minimum legal standard of "rep-

11) The Kichwa Indigenous People of Sarayaku v. Ecuador, *supra* note 10, para. 216.

12) United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN GA Res. 47/135 (1992); United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), UN Doc. A/61/L.67 (2007); FCNM (*supra* note 7); International Labour Organisation (ILO) Convention on Indigenous and Tribal Peoples in Independent Countries (No. 169), available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C1 69.

13) For cases discussing the individual rights implications of Quebec's commercial sign policy and legislation and of a comprehensive agreement with the Maori in New Zealand, see Ballantyne et al. v. Canada, Comm. Nos. 359/1989, 385/1989, Views of 31 March, 1993, UN Doc. CCPR/C/47/D/385/1989 (1993); Apirana Mahuika et al. v. New Zealand, Comm. No. 547/1993, Views of 27 October 2000, UN Doc. CCPR/C/70/D/541/1993.

14) See *G. Pentassuglia*, *supra* note 6; *T. Koivurova*, Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects, International Journal on Minority and Group Rights 18 (2011), 1; Lautsi v. Italy, App. No. 30814/06, Judgment of 18 March 2011.

15) See eg Chapman v. United Kingdom, App. No. 27238/95, Judgment of 18 January 2001; Muñoz Diaz v. Spain, App. No. 49151/07, Judgment of 8 December 2009.

16) Committee on Economic, Social and Cultural Rights, Right of everyone to take part in cultural life, General Comment No. 21 adopted by the Committee on Economic, Social and Cultural Rights at its 43rd session, 21 December 2009, UN Doc. E/C.12/GC/21 (2009).

17) Ibid, at paras. 12–13.

18) Ibid, at sections B-C.

19) US President Wilson's Fourteen Points Address to Congress, 8 January 1918, point XIII (regarding Poland); see also similar references, including point IX (regarding Italy) and point XI (regarding several Balkan states).

20) The Aaland Islands Question (On Jurisdiction), Report of the International Committee of Jurists, League of Nations Official Journal, Special Supplement No. 3 (1920); The Aaland Islands Question (On the Merits), Report by the Commission of Rapporteurs, League of Nations Council Document B7 21/68/106 (1921). For a broader assessment, see *G. Pentassuglia*, Self-Determination, Human Rights, and the Nation-State, *supra* note 1.

21) *H. Hannum*, Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights, Philadelphia: University of Pennsylvania Press, 1996; *A. Cassese*, Self-Determination of Peoples: A Legal Reappraisal, Cambridge: Cambridge University Press, 1995.

resentative government" within the wider polity, which was upheld by the 1970 United Nations Declaration on Friendly Relations.[22]) This was implicitly confirmed by the Supreme Court of Canada in the 1998 Reference case.[23]) As the Court noted that "the right to self-determination of a people is normally fulfilled through internal self- determination", it also delved into the ways in which the constitutional framework, as defined by the interplay of federalism, democracy, the rule of law and the protection of minorities, could embody or enable a "meaningful" exercise of that right to the benefit of all the parties concerned, including groups and individuals within. It ultimately spoke to a wider practice concerned with equal rights, rights of participation in decision-making and a measure of territorial or cultural autonomy for distinctive ethno-cultural identities. The 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) importantly recognizes the right of internal self-determination while still articulating the overall protective framework as an intertwined bundle of entitlements to cultural protection within the state that are rooted in patterns of historical and persistent injustice.

II.B On the Edges of the System

These are no doubt important developments. Yet, they can as much illuminate as obscure what is at stake when it comes to grappling with the role of group identities in human rights discourse. In fact, there is no shortage of uncertainty about the limits of the legal categories that generally underpin the relationship between group protection and human rights. However significantly more progressive and open-ended than in the past, the equality-based approach still leaves unclear the degree of "sameness" or "difference" that can or should be derived from general norms in any particular case. For example, the grounding of indigenous property rights in circumstances of inequality raises the question of whether conditioning such rights on traditional social and economic activities may partly inhibit rather than empower indigenous communities' autonomy within their land.[24]) Moreover, it is not clear that such an approach can consistently support group identities or even generate positive obligations to that effect. In Thlimmenos v. Greece and Chapman v. United Kingdom,[25]) part of the argument before the European Court of Human Rights revolved around exemptions on religious or cultural grounds for members of the group. In the first case, the Court took the view (partly under Article 14 ECHR) that Greece had in the circumstances failed "to introduce appropriate exceptions" within the legislation in question for Jehovah's Witnesses, whereas in the second case it dismissed the notion that exemptions from planning laws could be treated as the subject of positive duties or indeed derived from the principle of equality itself. It is quite significant that Protocol 12 to the ECHR, which prohibits discrimination beyond the narrow context of ECHR rights, does not resolve the matter, nor has it been widely ratified.[26]) Indirect discrimination claims have remarkable potential but may be difficult to trigger unless state legislation is in place (as has invariably been the case before the Strasbourg Court), and their individual, collective, contingent or structural consequences may or may not inform particular equality considerations or may not derive from the equality argument alone.

While the articulation of group identities as quintessentially cultural claims partly removes that uncertainty, it still appears unable to make sense of a variety of individual and communal identities that could arguably qualify for protection. The Inter-American Court of Human Rights has firmly embraced the cultural argument in relation to indigenous communities and even extended it to non-indigenous groups such as Afro-descendants who are linked to patterns of abuse and exploitation dating back to European colonization. However, whether the Court might be prepared to extend similar protection to *every* conceivable ethno-cultural grouping within the state remains an open question. Tellingly, broad interpretations of general terms, such as "family" under the ICCPR and the ACHR, have been informed by cultural considerations, though in a context specific to indigenous identity.[27]) The European Court of Human Rights has acknowledged the cultural dimension of certain minority claims, and even of certain majority traditions, but it has appeared less than forthcoming in using the cultural argument as a transversal category that is able to support reasonable accommodation in matters of religious or ethnic diversity in the public sphere in response to state defences based on respect for secularism, democracy or gender equality.[28])

22) Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 (1970). See eg United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 2(2)–(4); UNDRIP, Articles 3, 4, 18 and 19; FCNM, Article 15; see generally G. *Pentassuglia*, Ethnocultural Diversity and Human Rights: Legal Categories, Claims, and the Hybridity of Group Protection, The Yearbook of Polar Law, vol. 6 (2015), 271–280; *M. Weller* (ed), Political Participation of Minorities: A Commentary on International Standards and Practice, Oxford: Oxford University Press, 2010.

23) Reference Re Secession of Quebec [1998] 2 S.C.R. 217 (hereinafter, the Reference case).

24) See eg *L. Rodríguez-Piñero Royo*, El impacto international de la sentencia, in El caso Awas Tingni: Derechos Humanos entre lo local y lo global, ed *F. Gómez Isa*, Bilbao: Universidad de Deusto, 2013, 178–181.

25) Thlimmenos v. Greece, App. No. 34369/97, Judgment of 6 April 2000; Chapman v. United Kingdom, App. No. 27238/95, Judgment of 18 January 2001.

26) 11 April 2000, CETS No. 177; established Council of Europe states are conspicuously absent from the list of those members who have ratified the protocol. In the context of European Union equality law, see also *J. Marko*, Five Years After: Continuing Reflections on the Thematic Commentary on Effective Participation: The Interplay between Equality and Participation, in Minorities, Their Rights, and the Monitoring of the European Framework Convention for the Protection of National Minorities – Essays in Honour of Rainer Hofmann, ed *T. Malloy* and *U. Caruso*, Leiden: Martinus Nijhoff Publishers, 2013, 97 at 110 (noting that "[u]ntil today, neither primary nor secondary EU law prescribe a 'positive duty' to take positive measures which must – by definition – be group-oriented").

27) *G. Pentassuglia*, *supra* note 8, 73–74.

28) See eg *S. Borelli*, Of Veils, Crosses and Turbans: The European Court of Human Rights and Religious Practices as Manifestations of Cultural Diversity, in Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law, ed *S. Borelli* and *F. Lenzerini*,

Similar ambiguities surround the capacity of Article 27 ICCPR to effectively address identity claims. One of the early commentators on this provision went as far as to suggest that it was unclear what its specific contribution really was other than "avoiding the consequences of an unenlightened interpretation of other provisions".[29]) While the prevailing reading of Article 27 has largely outweighed the provision's negative formulation, including positive duties in the private sphere or positive rights to effective participation, critical questions remain about the ability of this norm to operate meaningfully across the wide(r) spectrum of group diversity, including minority languages, minority education and/or minority religions. For example, in the recent case of Leonid Raihman v. Latvia concerning a claim by a Russian-Jewish minority member to have his name on his passport spelled in its Russian-Jewish form, the Human Rights Committee found a breach of Article 17 ICCPR, but two Committee members argued that the case should have been considered under Article 27 on the basis that the Committee's jurisprudence on indigenous cultures applied, in their view, to minority religious cultures as well.[30]) In short, below the surface of unquestionably positive developments lies a deeper sense of incompleteness in the construction of this specialized provision, as the Human Rights Committee struggles to reconcile generic accounts of rights with more targeted views of the field informed by historical or context-specific circumstances.

One typical critique of the cultural argument in this context is that it encourages the "essentialization" of group cultures at the expense of politically and legally more ambitious narratives, including (where appropriate) autonomy or self-government. As the debate over legal pluralism shows, there is certainly merit in the notion that too "culturalist" an approach may be in tension with other interests, such as internal communal reform or the protection of the rights of individuals.[31]) Nevertheless, it is difficult to argue that cultural groups, particularly those attached to a homeland, can ground a claim to self-determination (or autonomy) *solely* in their communal identity. As the post-1945 international law of self-determination gradually emerged out of United Nations practice, those groups claiming to have suffered discrimination at the hands of settler states or new sovereigns were left with the option of aligning with the decolonization paradigm or, later on, seeking redress for gross human rights violations committed against them by the state. Retrospectively, such groups, particularly indigenous communities, did not pursue the former argument with any degree of consistency. And as the recent case of Kosovo shows, international law has hardly endorsed separate statehood as a general international legal remedy for group-based human rights violations.[32]) Whatever dilemmas affect the substance of the right, self-determination has traditionally attracted a variety of claimants arguing for their status as "peoples". Yet, the concept of "peoplehood" as a freestanding and identity-based human rights category has been generally met with resistance in international legal doctrine and practice.

II.C Legal Hybridity as a Synthesis

The interplay of legal developments and conceptual fluidity in the field paradoxically results not in inhibiting further progress but in the proliferation of hybrid sites of protection for group identities. More specifically, rigid dichotomies between the individual and the group in human rights law are giving way to complex, yet practical, articulations of what is loosely perceived as a bundle of claims pervasively linked to one another, the hybrid outlook of which opens up possibilities for various degrees of protection. Valid analytical distinctions among individual rights that can be activated on a group basis, group rights in the sense of jointly held rights of group members (collective rights) and group rights in the sense of rights held by groups as such (corporate rights)[33]) broadly resonate with practical dimensions of human rights but do not necessarily work as sharply separate categories as one might assume from a purely conceptual point of view.

For example, the relationship between Article 27 ICCPR rights as collective rights and certain collective dimensions of freedom of religion – such as the viability of re-

Leiden: Martinus Nijhoff Publishers, 2012, 55. A similar reluctance is reflected in the recent case law of the Luxemburg-based European Court of Justice operating under EU law in relation to religious clothing in the workplace: Achbita v. G4S Secure Solutions NV, Case C-157/15, Judgment of 14 March 2017.

29) *N. Rodley*, Conceptual Problems in the Protection of Minorities: International Legal Developments, Human Rights Quarterly 17 (1995), 48 at 65.

30) Comm. 1621/2007, Views of 30 November 2010, UN Doc. CCPR/C/100/C/100/D/1621/2007 (2010), Appendix, Individual opinion of Committee members Mr. Rafael Rivas Posada and Mr. Krister Thelin (dissenting), para. 8.6. More broadly, the Human Rights Committee has been seemingly reluctant to recognize positive obligations in the context of the status or special protection of minority languages, minority education or minority religions. See eg the Ballantyne case, *supra* note 13; Waldman v. Canada, Comm. No. 694/1996, Views of 5 November 1999, UN Doc. CCPR/C/67/D/694/1996 (1996); *N. Ghanea*, Are Religious Minorities Really Minorities?, Oxford Journal of Law and Religion 1 (2012), 1. However, in Rakhim Mavlonov and Shansiy Sa'di v. Uzbekistan, Comm. No. 1334/2004, Views of 19 March 2009, UN Doc. CCPR/C/95/D/1334/2004 (2009), the Committee conceded, without further elaboration, that "education in a minority language is a fundamental part of minority culture" in the context of Article 27 (para. 8.7).

31) See eg *H. Quane*, Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?, Oxford Journal of Legal Studies 33 (2013), 675; for conceptual debates over domestic approaches, see *N. Bankes*, Recognising the Property Interests of Indigenous Peoples within Settler Societies: Some Different Conceptual Approaches, in The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights, ed *N. Bankes* and *T. Koivurova*, Oxford: Hart Publishing, 2013, 21 at 24–30.

32) Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 22 July 2010, I.C.J. Reports 2010, p 403, paras. 51, 56, 82. In the Reference case (*supra* note 23), the Supreme Court of Canada noted that "external" self-determination in the form of "remedial secession" would be contingent upon the state failing to respect "internal" self-determination, though it did question whether remedial secession could be considered an established international law standard (ibid, paras. 134–135).

33) *P. Jones*, Groups and Human Rights, in Human Rights: The Hard Questions, ed *C. Holder* and *D. Reidy*, Cambridge: Cambridge University Press, 2013, 100; *P. Jones*, Human Rights, Group Rights, and Peoples' Rights, Human Rights Quarterly 21 (1999), 80.

ligious communities or the protection of religious sites[34]) – arguably defies a strict operational distinction between rights that are possessed and exercised collectively and rights that are possessed by individuals severally but still enable group activity. In this sense, the European Court's comparatively more timid approach to group issues under the ECHR still retains an important space for recognizing the legitimacy of collective interests deriving from cultural – notably religious – communities and even for fostering group-oriented readings of discrimination cases. Tellingly, the Committee on Economic, Social and Cultural Rights has very loosely framed cultural rights under the ICESCR as *both* rights of individuals and rights of groups built around entitlements to freely choose a specific set or multiple sets of cultural goods in order to facilitate access to such goods and participation in the design and implementation of laws affecting them.[35]) The Committee has indicated that such a participation should involve "their free and informed prior consent" when their "cultural resources ... are at risk".

This level of hybridity is anything but unique to these more general human rights instruments; in reality, it has become something of a hallmark of much of human rights practice, including more complex cases. For all its significance and transformative potential, the recognition of indigenous autonomy in the UNDRIP, for example, still requires the group to engage in negotiations with the state (and vice versa) over the exact terms of its political status, its cultural autonomy and/or legal systems where they exist, as well as to work out regimes that are consistent with the rights of individual members and non-members. Some of these uncertainties tap into the relational philosophy of the UNDRIP and the consequent demand on all the parties concerned to engage in what the Supreme Court of Canada called "a continuous process of discussion"[36]) – a process that is designed to work out the terms of the indigenous peoples-state relationship. Other global and regional practice has similarly developed a discourse whereby formally individual and group rights not only meet but are *explained* in light of each other's cross-cutting and intertwined dimensions, be they religion, culture, property, self-determination, participation or a combination of these. Certain individual rights have been re-read to incorporate group rights at sub-state level, and group rights (eg rights to natural resources) have been re-read to partly endorse the logic of the individual rights (eg property rights) to which they are said to be intimately related as a matter of substance and process.[37]) Ambitious peace settlements equally appeal to "hybrid" ideas of self-determination resulting from cumulative views of standards in an attempt to govern competing individual and group claims.[38]) In a non-conflict scenario, the Draft Nordic Saami Convention, produced in 2005 by Norway, Finland and Sweden together with the respective Nordic Saami parliaments, exemplifies a major attempt at institutionalizing aspects of the Saami legal order as a central component of Saami self-determination within wider state systems,[39]) including conflicts of law norms, forms of territorial and cultural autonomy and weaker translations of Saami legal practices into state law.[40])

In sum, the role of group identities in human rights discourse is increasingly multi-layered, and increasingly hybrid at that. In some cases, human rights practice will enable vitally important group activity. In other cases, it will protect the distinctive collective interest of the group through measures that target specific rights. In still other cases, it will create a framework for institutional and policy action to be worked out at the local level. For all the progress that has been undisputedly made on several fronts of human rights law, there is, however, a sense that the international human rights regime leaves space for conceptual ambiguity vis-à-vis the pathways on which it needs to be set for ethno-cultural group identities to be taken seriously. More specifically, the limitations and uncertainties surrounding the field have simultaneously fed into – and are probably a function of – broader (conceptual, non-doctrinal) perspectives on the very significance of group identities, their personal scope and the ways in which international (human rights) law can or should respond to them.

The remainder of this article provides an illustration and critique of some of these conceptual instabilities.

III. The Conceptual Instabilities of Human Rights Discourse

III.A Identity Matters

It can be argued, first, that certain ambivalences in the field are in part the upshot of narratives that question the very validity of claims relating to ethno-cultural group identities.

Much of this thinking essentially seeks to deconstruct the meaning(s) of such identities from a critical, "post-cultural" (post-modern) or cosmopolitan angle.

Martti Koskenniemi, for example, has argued that, since there is no natural standard to assess the existence of "national" communities, "national" self-determination claims (and, by analogy, group identity claims more

34) See eg the European Court of Human Rights' decision in Metropolitan Church of Bessarabia and Others v. Moldova, Appl. No. 45701/99, Judgment of 13 December 2001; *P. Jones*, Groups and Human Rights, *supra* note 33, 107.

35) See *supra* note 16, para. 15(a).

36) See the *Reference* case, *supra* note 23, para. 68.

37) *G. Pentassuglia*, Toward a Jurisprudential Articulation of Indigenous Land Rights, European Journal of International Law 22 (2011), 165 at 187–190, 198.

38) For an excellent discussion in conflict contexts, see *C. Bell*, On the Law of Peace: Peace Agreements and the Lex Pacificatoria, Oxford: Oxford University Press, 2008, chs. 5, 11 (arguing that hybrid self-determination, including autonomy arrangements, from the Bougainville to the Belfast agreements, can be pursued as "the best application of the law in situations of intrastate ethnic conflict", p 225).

39) The unofficial version of the Draft Convention is available from the Saami Council website at http://www.saamicouncil.net. For an extensive commentary, see *N. Bankes* and *T. Koivurova*, *supra* note 31.

40) For this gamut of models, see *J.W. Hamilton*, Acknowledging and Accommodating Legal Pluralism: An Application to the Draft Nordic Saami Convention, in *N. Bankes* and *T. Koivurova*, *supra* note 31, 45–77.

المنارة للاستشارات

broadly) should be understood essentially as ways "to enlist popular support for the struggle against political oppression", be they in the form of anti-colonialism as we have known it or some other form of resistance or reaction as a legitimate process of political contestation.[41]) Others have gone as far as to question the plausibility of coherent cultural, national or identity claims as significant drivers of human identity in an era of globalization and mobility. For them, if there is any culture or identity at all, it is a global one that dissolves, not affirms, differences built around "natural languages" and "natural cultures"; it is one that operates in circumstances of "radical heterogeneity and fragmentation", which are no longer capable of sustaining any serious concept of (group) identity within or across state boundaries.[42]) Needless to say, several of these perspectives also exemplify concerns about essentialism and varying degrees of hostility or suspicion towards right claims attached to a community defined in (broadly understood) ethnocultural terms (be it a minority or majority group).[43])

However, while it may be historically accurate to link several group claims to positive emancipatory projects, and others to more destructive projects of political manipulation, aggressive chauvinism and/or cultural essentialism, it would be wrong to assume either that group identities can be reduced to patterns of discourse or that all identity claims involve a fundamental re-engineering of the state as opposed to more limited forms of recognition. For one thing, social science research has convincingly shown that, whatever their origins and form, and whatever their openness and potential for negotiation and revision, group identities must be taken seriously, as they are no less real as underlying social determinants than the political projects or priorities that help mediate them (or some of them).[44]) On the other hand, virtually no states are home to homogenous sociocultural "nations", yet most states seek to secure one version or another of a uniform public culture or uniform cultural paradigm that poses a threat (in principle or in practice) to inter-group diversity. The very emergence of new states in the name of "national" independence or the continuing running of states as nation-states – from Europe to the Americas to Africa and Asia – has consistently raised very real questions about the rearrangement of authority within the newly constituted or established entity in order to meet certain group demands. While not all nation-building projects have proved wholly incapable of recognizing some form of group diversity within (at least in some of their founding documents), they certainly indicate the salience of community identity of one form or another *across* the fabric of emerging or established states. They speak to a constant interplay of homogenizing tendencies and group representation, on the one hand, and cultural claims and the state's own pursuit of social and cultural protection or integration, on the other.[45])

An arguably more subtle way of deconstructing the role of group identities is by making identity claims overwhelmingly dependent upon strictly individual choice. Obviously there are different facets to this dimension, and some of them can be treated as relatively uncontroversial (at least as a matter of principle). Individual self-identification acquires particular salience vis-à-vis claims made by the group and/or assumptions about group identities made by the state. While such claims normally presuppose a legitimate institutional agent that is capable of making them (or at least individuals who can legitimately voice the shared collective interest), each putative member of the group is in principle free to opt out of her/his putative group membership and/or to challenge any group status, or lack of it, imposed upon them by the state.[46]) One can thus argue that, under international human rights law, compulsory individual identifications with (or membership in) the group are not permitted, be they enacted through legislation or other domestic practices. It is also the case that group arrangements, like certain power-sharing agreements whereby individuals, including members of smaller minorities, must either declare their affiliation with any of the dominant groups or accept certain legal consequences (eg in relation to certain political offices or types of employment) resulting from their free identification as belonging to a group other than the dominant one(s), or to no particular group, pose especially difficult challenges to the most appropriate way of articulating group identities that reconciles effectively with individual interests.[47]) In Sejdić and Finci v. Bosnia and Herzegovina, for example, the European Court of

41) *M. Koskenniemi*, National Self-Determination Today: Problems of Legal Theory and Practice, International and Comparative Law Quarterly 43 (1994), 241 at 262.

42) For discussion and critique of this line, see eg *J. Tully*, Strange Multiplicity: Constitutionalism in an Age of Diversity, Cambridge: Cambridge University Press, 1995, 45–47 (citing the work of *James Clifford* and *Peter Emberley*).

43) *F. Tesón*, Ethnicity, Human Rights, and Self-Determination, in International Law and Ethnic Conflict, ed *D. Wippman*, Ithaca and London: Cornell University Press, 1998, 86; *F. Tesón*, Introduction: The Conundrum of Self-Determination, in The Theory of Self-Determination, ed *F. Tesón*, Cambridge: Cambridge University Press, 2016, 1.

44) See eg the insightful analyses of *I. Berlin*, Nationalism: Past Neglect and Present Power, in Against The Current: Essays in the History of Ideas, ed *H. Hardy*, London: The Hogarth Press, 1979, 333; *C. Geertz*, The Interpretation of Cultures, London: Fontana Press, 1973; *C. Geertz*, Mondo globale, mondi locali: cultura e politica alla fine del ventesimo secolo, Bologna: il Mulino, 1995, chs. II and IV; *J. Tully*, *supra* note 42; *M. Walzer*, The Paradox of Liberation: Secular Revolutions and Religious Counterrevolutions, New Haven and London: Yale University Press, 2015.

45) See generally *M. Walzer*, *supra* note 44; *G. Pentassuglia*, Ethno-Cultural Diversity and Human Rights, *supra* note 1 (eg chapters by *Chris Chapman*, *Dwight Newman*, *Tom Hadden*, and *Ephraim Nimni* and *Lucia Payero*); for a review of similar debates in South East Asia, see eg *J. Castellino*, Autonomy in South Asia: Evidence for the Emergence of a Regional Custom, in Minority Accommodation through Territorial and Non-Territorial Autonomy, ed T. *Malloy* and *F. Palermo*, Oxford: Oxford University Press, 2015, 217.

46) Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, para. 35; Ciubotaru v. Moldova, App. No. 27138/04, Judgment of 27 April 2010; Sandra Lovelace v. Canada, Comm. No. 24/1977, Views of 30 July 1981, Human Rights Committee, Annual Report (1981), 166; UNDRIP, Articles 33(1), 44, 46(2)-(3).

47) See eg FCNM Advisory Committee, Third Opinion on the United Kingdom, 30 June 2011, paras. 44–47; Third Opinion on Cyprus, 19 March 2010, para. 39; Fourth Opinion on Cyprus, 18 March 2015, paras. 11–12; Third Opinion on Italy, 15 October 2010, para. 53.

Human Rights concluded that Bosnia's power-sharing agreement signed at Dayton in 1995 was incompatible with Article 14 ECHR insofar as it excluded members of communities other than the Bosniak, Croat and Serbian ones (who had freely so self-identified) from certain political offices.[48])

However pressing these concerns are – some of them have long been canvassed by international standards – a strand of expert analysis has gone on to draw the unwarranted conclusion that "group identity" is little more than shorthand for the individual's subjective choice. In its latest Thematic Commentary on "The Scope of Application of the Framework Convention for the Protection of National Minorities", the FCNM Advisory Committee has argued that Article 3 (right to free self-identification) is "necessarily applicable to everyone, as every person must have the right to identify freely as a member of a specific group, or to choose not to do so". Although the Explanatory Memorandum attached to the Convention points to objective criteria as a way of supporting (or disproving) subjective claims, the Committee notes that:

> [It] has intentionally refrained from interpreting what such objective criteria may be, as it is clear from the wording of the Explanatory Report that they must only be reviewed vis-à-vis the individual's subjective choice. Thus, objective criteria do not constitute elements of a definition.[49])

It can be questioned whether this is a correct reading of the Explanatory Memorandum. Paragraph 35 of this document states in no uncertain terms that the subjective choice is "inseparably linked" to objective criteria, and one would have thought the gist of those criteria to be drawn (however imperfectly) from the Convention's scope itself and the basic principles underpinning the field in international law. In Ciubotaru v. Moldova before the European Court of Human Rights,[50]) Judge *Mijović* went as far as to contend that self-identification was primarily "a matter of personal perception rather than a matter based on objective grounds". He argued that "[in] Moldova, just as in Bosnia and Herzegovina, ethnic affiliation is not to be regarded as a legal and objective concept, but a political and subjective one". Judge *Mijović* concurred with the majority's finding of a breach of Article 8 (private and family life) not on the basis (upheld by the Court) that Moldova had failed to provide the applicant with an opportunity to adduce evidence in support of his identity claim but rather on the basis that the applicant's self-identification choice should have been respected *regardless* of any objective parameters to establish affiliation with a particular group. These lines of thinking hardly fit in with established international law and human rights practice,[51]) though they most certainly offer a critique of such practice. It is one thing to mark out the limits of state action in recording and classifying group identities, and it is quite another to re-conceptualize group identities in ways that break them down into a highly variable set of subjective views or discourses. By reconfiguring those identities as a mirror of "externally imposed markers",[52]) such a re-conceptualization effectively essentializes "atomized" choices at both the point of exit from and the point of *entry* into an indeterminate number of legal regimes, as opposed to engaging with the legitimacy of core interests that attach to individuals *and* groups alike.[53])

III.B Whose Identity?

A parallel source of instability is generated by the chronic uncertainty affecting the status of ethno-cultural groups in international law. Much of this instability is a reflection of certain – not uncommonly competing – ideas about how group identities (or some of them) relate or ought to relate to human rights. A prime example of this is the rather complex debate over so- called "new" minorities as distinct from "old" or traditional (national) minorities. The argument in favour of extending the concept to include immigrants and similar groupings rests essentially on the notion that cultural identities or cultural differences inhere in all individuals regardless of communal or situational circumstances. As long as access to a cultural "context of choice"[54]) affects virtually everyone, there would be no reason, so the argument goes, for denying minority status to immigrants while granting it to other groups within the state. In terms of the legal categories mentioned earlier in this article, the point appeals to the necessarily universal scope of rights to culture in (explicit or implicit) conjunction with the principle of equality.

While the argument has become increasingly popular in some expert circles, it still faces a range of rather formidable legal and policy challenges. For one thing, there is virtually *no* empirical evidence that indicates an emerging international consensus on the above extension as a matter of law. Take, again, the FCNM. Although the Advisory Committee has consistently supported the idea of a broader application of this treaty, a large number of

48) Apps. Nos. 27996/06 and 34836/06, Judgment of 22 December 2009.

49) Thematic Commentary No. 4, The Scope of Application of the Framework Convention for the Protection of National Minorities, 27 May 2016, ACFC/56DOC(2016)001, para. 10.

50) *Supra* note 46.

51) See generally *G. Pentassuglia*, Minorities in International Law: An Introductory Study, Strasbourg: Council of Europe Publishing, 2002, 72–74; it can also be argued that the European Court of Human Rights does not regard self-identification as an exclusive criterion: see the Chamber's ruling in Ciubotaru (*supra* note 46, paras. 57–58) and Gorzelik and Others v. Poland, App. No. 44158/98, Judgment of 17 February 2004 (for commentary, see *G. Pentassuglia*, Protecting Minority Groups through Human Rights Courts: The Interpretive Role of European and Inter-American Jurisprudence, in The Cultural Dimension of Human Rights, ed *A.F. Vrdoljak*, Oxford: Oxford University Press, 2013, 104–106).

52) *Supra* note 49, para. 37.

53) Indeed, the logical, and quite extraordinary, implication of this conceptual approach is that individual choice would be (ontologically and legally) *constitutive* of the identity phenomenon itself, not (or not only) an ex post facto safeguard against certain pre-existing socio-cultural communities that people are born into (whatever their legal characterization) and that they can perceive as a significant part of their core identity. From a different (negative) angle, the essentialization of choice can even go as far as to justify restrictions on basic identity rights in the name of public "neutrality" (see *supra* note 28).

54) *W. Kymlicka*, Multicultural Citizenship: A Liberal Theory of Minority Rights, Oxford: Oxford University Press, 1995.

المنارة للاستشارات

the current states parties that have taken a stance on this matter (*at least* more than half of the current treaty membership) has equally consistently held on to a more restrictive understanding of the concept of "national minority". As I suggested in my earlier work,[55]) it is entirely possible (and in some cases perhaps even advisable) for individual states to provide extended protection on a de facto (discretionary) rather than de jure (obligatory) basis, as evidenced by a limited number of later cases. Equally, it is *not* permissible for states to make group status dependent upon exceedingly restrictive (discrimination-inducing) criteria, such as state recognition, territorial concentration or state kinship, which lie beyond the minimum parameters supplied by international human rights law. For present purposes, though, the key point is that, while the cultural argument can (indeed must) support essential elements of protection under general human rights norms (eg access to non-discrimination tout court or to basic religious rights), it struggles to make sense of those largely contextual considerations that underpin the *prioritization* of certain group interests over others within state jurisdictions, including specific levels of decision-making authority involving minority and majority communities.[56])

An adapted cultural argument that has proved relatively more successful so far has emerged in the context of debates over indigeneity. As I mentioned in subsection II.B, the Inter-American Court of Human Rights has broadly interpreted that concept to include certain non-native and land-dependent traditional communities. Similarly, the African Commission on Human and Peoples' Rights has linked selective "peoples' rights" under the ACHPR – mainly the right to existence and self-determination (Article 20), the right to natural resources (Article 21) and the right to development (Article 22) – to an expansive concept of indigeneity that is not dependent upon "prior occupancy" of traditional communal lands and resources.[57]) In the ground-breaking Endorois case against Kenya, for example, the Commission recognized the pastoralist community in question as an indigenous community on account of the group's long-standing cultural and land tenure practices, "beyond the "narrow/aboriginal/pre-Colombian" understanding of indigenous peoples".[58]) In addition to criteria of self-identification, territorial connection and cultural distinctiveness, notions of social marginalization, discrimination and non-dominance have informed such rethinking to a significant degree.

Despite a measure of relative jurisprudential success, questions have nonetheless been raised as to the longer-term sustainability of this particular way of (re-) conceptualizing certain group identities. For example, legal theorists such as *Patrick Macklem* and *Dwight Newman* have warned against the danger of overemphasizing generic non-dominance at the expense of a more coherent account of the normative purposes of the field,[59]) while other prominent voices such as *Will Kymlicka* and *Benedict Kingsbury* have, in different ways, exposed critical dimensions of the ambivalent relationship between "indigenous peoples" and "national minorities" or otherwise traditional ethno-cultural communities.[60]) It can be argued that, while a flexible legal concept of "indigenous peoples" is fast gaining ground, this concept, rooted as it is in international law, does not surrender the task of identifying the groups to state legislation or purely (not infrequently unfavourable) domestic practices, nor does it surrender it to the group through a notion of self-identification that does away with socio-historical evidence appropriate to the case.[61]) In fact, the flexible view reflected in the Inter-American and African case law seeks to render international human rights law more responsive to the position of the groups concerned. However, in ways that are highly reminiscent of the old/new minorities debate in Europe, the deployment of the cultural argument in connection with broader social equality concerns does not ipso facto settle group status issues, nor does it invite to address the underlying reasons why certain ethno-cultural groups merit protection in the way they do.

Probably the holy grail of legal discussions about group status is tied to popular claims to "national" self-determination made by groups that perceive themselves as fairly coherent cultural communities linked to a traditional homeland. In terms of legal developments post-1945,

55) *G. Pentassuglia*, *supra* note 51, 65–66.

56) The FCNM Advisory Committee, for example, has encouraged the enjoyment of specific language and education rights under the FCNM irrespective of traditional residency or numerical requirements, in the name of promoting multilingualism and diversity as well as equality (see *supra* note 49, paras. 31, 42 and 79). For commentary on the national minority/immigrants divide and the implications for *both* national minorities and majorities, see *D. Newman*, Why Majority Rights Matter in the Context of Ethno-Cultural Diversity: The Interlinkage of Minority Rights, Indigenous Rights, and Majority Rights, in *G. Pentassuglia*, Ethno-Cultural Diversity and Human Rights, *supra* note 1; *A. Patten*, Equal Recognition: The Moral Foundations of Minority Rights, Princeton University Press, 2014, ch. 8. See also section D below.

57) Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa, IWAGIA (Copenhagen) and ACHPR (Banjul) (2005), section 4.2.

58) *Supra* note 4, para. 159. In the Ogiek case (*supra* note 4), the African Court on Human and Peoples' Rights situated a broadly similar line on indigenous groups within the much broader context of how to read the specific notion of peoples' rights under the ACHPR (see *infra* note 70).

59) *P. Macklem*, The Sovereignty of Human Rights, Oxford: Oxford University Press, 2015, ch. 6; *D. Newman*, *supra* note 56; see also *F.M. Ndahinda*, Indigenousness in Africa: A Contested Legal Framework for Empowerment of "Marginalized" Communities, The Hague: T.M.C. Press, 2011.

60) *B. Kingsbury*, Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law, New York University Journal of International Law and Politics 34 (2001), 189 at 233, 244; *W. Kymlicka*, Multicultural Odysseys: Navigating the New International Politics of Diversity, Oxford: Oxford University Press, 2007, 273–291.

61) For concerns relating to an open-ended approach to "indigenous peoples" as a legal concept, see *P. Macklem*, *supra* note 56, 156–162; domestic policy and legislation in Africa frequently involve issues of group recognition and land security against the backdrop of restrictive internal requirements: see ILO/ACHPR, Overview Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples' Rights on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries, 2009, paras. 117–121.

the right to self-determination was deliberately narrowed primarily to the (identity-blind) right of dependent territories (and "peoples") to achieve political and legal independence,[62]) although the simultaneous reshaping of self-determination as a human right laid the foundations for the later broader articulation of the right in common Article 1 of the UN Covenants on Human Rights ("all peoples have the right to self-determination"), at least within the institutional (constitutional and political) framework of the state.[63])

However, it is still relatively unclear how international law (and the international community) should respond to sub-state groups' claims to self-determination that are seemingly in conflict with this (largely territorial) paradigm. The problem is unlikely to be resolved through precise definitions or judicial or quasi-judicial pronouncements over the status of a claimant as a "people" or a "nation" within an emerging or established state. For example, the then European Community Arbitration Commission on Yugoslavia located the position of the Bosnian Serbs around hybrid notions of "population", "minority" and "ethnic group" for purposes of self-determination within Bosnia.[64]) The International Court of Justice, for its part, held that Kosovo's Declaration of Independence was not, in and of itself, at odds with international law, but still refrained from recognizing the population of Kosovo, let alone the Kovosar Albanians, as a people in a legal sense.[65]) Critics have suggested that the awkwardness surrounding these rulings reflects a failure to recognize sub-unit claims from within the internal federal boundaries of collapsing Yugoslavia or a failure to genuinely engage with self-determination issues from within Serbia as an established state.[66]) Yet, it can be argued that these pronouncements underscore a deeper tension between human rights law and claims to self-determination made by "national" groups, one that can be resolved neither by carving out entire states out of a "national" *droit acquis* in "abnormal" circumstances of territorial and political transition,[67]) nor through outright rejection of such claims or some alternative version of them.[68])

Remarkably, in the 1998 Reference case, the Supreme Court of Canada noted in no uncertain terms that determining the exact status of the French-speaking community of Quebec, or indeed of any other group within Quebec, as a "people" was not necessary in the case at hand. Given that much of the judgment situates Quebec's position in the context of a wider process of internal self-determination and even the possibility of Quebec's secession,[69]) such an agnostic line says more about the ambiguities of the "peoplehood" (or "nationhood") argument than it says about the substance of self-determination. By adapting from the 1970 United Nations Declaration on Friendly Relations, the Court did not prioritize group status issues but instead focused on the "whole of the people or peoples resident within the territory" as a basis for proper constitutional (internal) arrangements. What does come into view is thus an acknowledgment of the coexistence of various "national" groups within the state and the requirement of complex constitutional conversations designed to achieve accommodation of that diversity, *regardless* of precise communal classifications.

These decisions may struggle to fit rigid patterns of doctrinal coherence or fully match expectations on the ground. Still, they seem to be able to make space for a constructive, though tentative, response of international (human rights) law to group identities (or some of them) in ways that arguments built squarely around "peoplehood" (or "nationhood") per se cannot, as they tend to be either implausible or incomplete. The point here is not that some sub-national groups can never be viewed as "peoples" for legal purposes, however hybrid and highly contingent such a recognition may be,[70]) but rather

62) In this sense, it was a way of prioritizing certain communities (territorially defined) over other communities (however defined); it did not reflect a conscious "cherry-picking" act from a pre-set of universally recognized "ethnic" or "cultural" nations. See *G. Pentassuglia*, Self-Determination, Human Rights, and the Nation-State, *supra* note 1, section 3.1. See also *A. Anghie*, Nationalism, Development and the Postcolonial State: The Legacies of the League of Nations, Texas International Law Journal 41 (2006), 447 (noting that, if anything, the new "culture" of the postcolonial state was to transcend local cultures altogether).

63) Human Rights Committee, CCPR General Comment No. 12: Article 1 (Right to Self- determination), The Right to Self-Determination of Peoples, adopted by the Human Rights Committee at its 21st session, 13 March 1984, para. 4, available at http://www.refworld.org/docid/453883f822.html.

64) European Community Arbitration Commission, Opinion No. 2, 11 January 1992, International Legal Materials 31 (1992), 1497.

65) *Supra* note 32, paras. 51, 56, 82, 89, 105, 109.

66) See eg *R. Falk*, Human Rights Horizons: The Pursuit of Justice in a Globalizing World, New York and London: Routledge, 2000, 115–116 (commenting on *H. Hannum*, Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?, Transnational Law and Contemporary Problems 3 (1993), 59).

67) Just as in the Aaland Islands case (*supra* note 20), the international community's intervention to address the claims in those transitional circumstances did not use the "nation" as the ultimate controlling legal principle, so the European Community's heightened competence in Yugoslavia did not buttress the equation between "natural" (national) communities and nation-states.

68) However arguably clumsily, the so-called Badinter Commission's Opinion No. 2 (*supra* note 64) still sought to reconcile sovereignty, self-determination and human rights by looking at minority protection and possible dislocations of power across national boundaries. See more broadly *G. Pentassuglia*, Self-Determination, Human Rights, and the Nation-State, *supra* note 1.

69) The Court ruled out the possibility of remedial secession on human rights grounds, even though it was unclear (a) how that reconciled with the Court's silence as to who was entitled to remedial secession – or indeed whether there was such an entitlement – in the first place, and (b) whether Quebec would have been entitled to remedial secession as a distinct "people" or some other entity, had denial of access to government and gross human rights abuses been proven.

70) Some such groups have gradually come within the purview of the ACHPR as being entitled to "peoples' rights", and indigenous groups have been recognized as "peoples" entitled to self- determination under the UNDRIP. In the Ogiek case (*supra* note 4, para. 198), the African Court on Human and Peoples' Rights broadly read the beneficiaries of specific ACHPR rights to include "sub-state ethnic groups and communities" in addition to the whole population of the state. See generally *supra* note 57, ch. III, and note 58. However, as I have discussed elsewhere (*G. Pentassuglia*, Do Human Rights Have Anything to Say about Group Autonomy?, in *G. Pentassuglia*, Ethno-Cultural Diversity and Human Rights, *supra* note 1, section 2.4.2), neither of these cases reflects a strict terminological coherence or a quest for group status precision, either within the context of the same treaty or across the field. Crucial

المنارة للاستشارات

that national legislators, adjudicators or policy-makers are hardly keen to make this sort of determination.[71]) If anything, constructive responses of the kind mentioned above should be taken to represent particular participation-based articulations of underlying (general) issues of group protection and inter-group diversity within plural societies, rather than the effect of some kind of logical or normative necessity, let alone an international legal requirement, regarding sub-state "peoplehood".

III.C Between Effectiveness and Individuals' Cosmopolis

In addition to critiques of the very substance of such identities and their personal scope, the oscillations of legal and policy discourse unsurprisingly resonate with broader narratives questioning the ability of international law to relate to complex socio-cultural realities, or its ability to do so in distinctive ways. Recent analyses of group claims to secession or autonomy arrangements, on the one hand, and to democratic participation in governance, on the other, best illustrate the point.

At one end of the scale is what I might call the "effectiveness" approach to self-determination. It is essentially based on the notion that, because international law does not or cannot regulate matters such as unilateral secession or autonomy regimes within a state, the law of self-determination is inevitably hostage to facts on the ground. *Fernando Tesón*, for example, has argued that the principle of self-determination and the principle of territorial integrity prevail over one another depending on whether or not a secessionist movement is successful in overcoming resistance from the territorial state and the international community. Based on this model, the annexation of Crimea by Russia or the independence of Kosovo – both of which involved, for better or for worse, strong assertions of group identities – is *legally* a matter of self-determination (*vel non*) depending on whether or not Ukraine, Serbia and/or the rest of the world are factually capable of reversing it.[72]) As a rule of thumb, international law's clearly hostile, yet deregulatory, approach to unilateral secession can thus be overtaken by new political and military realities on the ground and can possibly become entrenched by some degree of international recognition. In a broadly similar fashion, international support for groups seeking autonomy arrangements (short of independence) within a state based on their sense of distinctiveness can be exceptionally vocal in response to new "facts" on the ground – the reality of territorial control and/or loss of life often coupled with the abolition of previous forms of self-government – and, conversely, more cautious and tentative (though not necessarily hostile) where these circumstances have not (or have never) been met.[73])

Leaving aspects of general international (or human rights) law aside,[74]) what is important for present purposes is to emphasize that the extent of the legal outcome in those circumstances is deemed to be largely a function of factual realities – "secession [or autonomy] in the streets", to borrow (and paraphrase) from the Supreme Court of Canada in the Reference case.[75]) Insofar as group identities are cast in the language of independence or autonomy, the "effectiveness" approach generally displaces human rights considerations in the name of security (*realpolitik*) priorities or, in a more attenuated form, tends to value group identities as valid human rights matters *only* by reference to regimes that already exist(ed) within a state.[76])

At the other end of the scale is a minimalist concept of participation in governance within states. As I noted earlier, international law's gradual shift away from colonial self-determination towards the notion of internal self-determination based on "representative government" has suggested an alternative avenue for addressing sub-state group identities. Nevertheless, prominent calls for equating internal self-determination with a distinct "right to democracy" under international law – the right of a people to engage in meaningful decision-making within the state – have raised concerns about the empirical accuracy of the claim and, more crucially, the different ways in which the requirement of democracy can or ought to be articulated. Leading proponents of narrow electoral views of democracy have emphasized general collective aspects of voting rights and internationally-backed processes of election monitoring rather than any additional requirement to rearrange decision-making authority for the benefit of particular groups.[77]) And yet, a "right to

omponents of indigenous rights come from legal settings where matters of group status are either irrelevant or have been deliberately omitted, and practice under the ACHPR suggests, if anything, the hybrid capacity of this instrument to protect a variety of minority groups, regardless of how to translate their communal pedigree into legal discourse.

71) Indeed, the reluctance by international bodies to engage in such classifications matches a similar reluctance in domestic settings: see eg *M. Suksi*, On the Entrenchment of Autonomy, in Autonomy: Applications and Implications, ed *M. Suksi*, Dordrecht: Kluwer Law International, 1998, 151 at 165 (noting that very few groups enjoying autonomy through domestic arrangements have been recognized as "peoples" for such purposes).

72) *F. Tesón*, Introduction: The Conundrum of Self-Determination, *supra* note 43, 7–8.

73) See eg the review of practice by *J. Ringelheim*, Considerations on the International Reaction to the 1999 Kosovo Crisis, Revue Belge de Droit International 2 (1999): 475.

74) *Tesón's* view, for example, seems to downplay international law's a priori resistance to validating facts that are deemed incompatible with peremptory rules of general international law. See eg *J. Vidmar*, Crimea's Referendum and Secession: Why it Resembles Northern Cyprus More Than Kosovo, available at www.ejiltalk.org/crimeas-referendum-and-secession-why-it-resembles- northern-cyprus-more-than-kosovo.

75) *Supra* note 23, para. 142.

76) The FCNM Advisory Committee has commended autonomy arrangements "in States parties where they exist" (Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, 27 February 2008, paras. 133–137).

77) See eg *T. Franck*, The Emerging Right to Democratic Governance, American Journal of International Law 86 (1992), 46; *G. Fox*, The Right to Political Participation in International Law, Yale Journal of International Law 17 (1992), 539; *G. Fox* and *B. Roth* (eds), Democratic Governance and International Law, Cambridge: Cambridge University Press, 2000. But see also United Nations Millennium Declaration, GA Res. 55/2, UN Doc. A/55/L.2 (2000), Section V, paras. 24–25.

democracy" understood as a mere entitlement to inclusion in the political community on a non-discriminatory basis does little to engage with group claims, including claims to specific involvement in decision-making and/or political autonomy.[78])

Indeed, this view often chimes with a deep-seated suspicion towards group identities and a preference for cosmopolitan views that deconstruct those identities in law and policy into generic accounts of multiple and cross-cutting identities attached to individuals as such within the political and global community.[79]) In the aforementioned FCNM Advisory Committee's latest Thematic Commentary, for instance, identities are not only decoupled from objective criteria; they are also linked up with highly fluid views of simultaneous individual belonging to multiple "minorities" and/or free association across the spectrum of available (minority or majority) identities within the state.[80]) What begins as a plausible claim to diversifying legal protections by safeguarding individual choice and circumstances ultimately takes the form (conceptually at least) of an open-ended endorsement of cosmopolitan perspectives that assume hybridized or mixed (ethno-cultural) identities to be the norm and understate (wittingly or unwittingly) the legitimacy of core group interests across (minority and majority) communities.

IV. Conclusions: Unpacking Identity Claims

I would argue that the conceptual instabilities discussed in section III do not merely mirror the ambivalent outlook of the relationship between human rights and group identities; they raise the broader question of whether there is a relatively more coherent way for international law in general, and human rights discourse in particular, to capture the legitimacy of group claims, including those made by sub-state groups who view themselves as somehow distinct communities.

As human rights practice yields a significant, and well-documented, measure of progress in addressing dimensions of group protection, including dimensions of group identities, the field is bound to face critical challenges not only at the level of practical implementation but also in terms of (re-)conceptualizing the normative purposes of legal interventions. An expansive approach to non-discrimination and cultural rights, primarily (though by no means exclusively) on the basis of general human rights norms, provides a refreshing cluster of legal developments but inevitably begs the question of whether norms specific to ethno-cultural groups correspondingly serve the main purpose of reaffirming levels of protection that can be afforded (perhaps even more comfortably at times) on broader grounds. Ideas of non- dominance that are so engrained in human rights accounts of ethno-cultural identities are intuitively essential to addressing certain sub-state group claims, yet an excessive focus on non-dominance may lead to obscuring the legitimacy of group interests across minority and majority communities at both state and regional levels. Emerging overly individualist ("cosmopolitan") views of identity add further pressure to the field. At the high end of the scale, self-determination claims built around cultural understandings of "peoplehood" (or "nationhood") in legal and/or public discourse may prove exorbitant or inconsistent with international human rights law, especially where taken in isolation from the rights of others within the political community. These are some of the conundrums that are considerably amplified by perennial debates over the legal status of groups and the attendant scramble by groups themselves (or some of them) to achieve recognition in one form or another depending on the rights claims involved. While the resulting increasing levels of hybridity involved in the human rights protection of group identities, as examined in subsection III.C, are definitely cause to rejoice, they should also give pause to reflect on the normative underpinnings of the field, as well as the potential and limitations of human rights discourse.

While traditional views of human rights have focused on the role of minority cultures within a universal code of human rights standards that values (at least in principle) cultural differences across the wide spectrum of human identity, the field's general concerns for non- discrimination and diversity have been invariably shaped by the historical circumstances of groups, including their distinctive character and treatment. For constitutional purposes, for example, major constitutional courts have consistently distinguished between general human rights protection and special (targeted) forms of group

78) Conceptually, a similar view is reflected in the so-called Pellet Report – a study on the legal impact of Quebec's possible secession from Canada prepared in 1992 by five international lawyers in response to a request from the Committee of the Quebec National Assembly. Regardless of any legitimate interests that Quebec may have in pursuing independence from Canada, the Report considered indigenous opposition to Quebec's independence from within the province by restating a generic right of indigenous groups to participate in democratic governance and to assert their own identity rather than advancing any entitlement to a robust consultation process with Quebec's authorities. See Territorial integrity of Quebec in the event of the attainment of sovereignty, para. 3.08, available at https://english.republiquelibre.org/Territorial_integrity_of_Quebec_in_the_event_of_the_attainm ent_of_sovereignty lien_121.
For a critique of generic approaches to democratic governance, see eg *S. Marks* and *A. Clapham*, International Human Rights Lexicon, Oxford: Oxford University Press, 2005, 61–70. From a different angle, see also *D. Orentlicher*, Separation Anxiety: International Responses to Ethno-Separatist Claims, Yale Journal of International Law 23 (1998), 1 at 44–78 (cautioning that a rapid move to free elections or referenda, and nothing else, might paradoxically support certain ethno-separatist claims and/or entrench ethnic divisions where a strong civic culture is still in the making; a similar point is made by *B. Kingsbury*, Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law, New York University Journal of International Law and Politics 34 (2001), 232).

79) See eg *T. Franck*, The Empowered Self: Law and Society in the Age of Individualism, Oxford: Oxford University Press, 2001.

80) *Supra* note 43, para. 13. Apart from more predictable overlapping identities across minority/majority lines or across a whole variety of human activities below and above the surface of the state, the notion that individuals *consciously* move *across minorities* within the meaning of international law (as opposed to exiting a minority group by way of voluntary assimilation into the wider society or rejoining a minority group at a later stage) remains untested. Moreover, we do not seem to have enough empirical data to suggest that this specific phenomenon occurs on such a scale so as to involve a proliferation of legal minority claims under human rights law.

المنارة للاستشارات

protection, such as language or education rights.[81]) The fact that various international human rights bodies have engaged in different ways with group identities informs the creation of hybrid and sophisticated sites of legal analysis and discussion but should not obscure the reasons why certain groups merit protection in the way they do.

What tends to remain under the (human rights) radar is the close interface between the protection of groups such as "national minorities" and "indigenous peoples" and the ways in which sovereignty relates to international law-making. The several rearrangements of sovereign authority that have been buttressed by international law throughout history have been constantly punctuated by efforts to mitigate the effects of those redistributions on groups who found themselves within wider political communities with which they had little or no affiliation. From the Westphalia settlement, to the Versailles and League of Nations settlement, to the rise of indigenous rights post-decolonization, to more recent attempts to govern the demise of the USSR and Yugoslavia and other processes of state reconfiguration, the mitigating impact of these multi-layered regimes of group protection underscores a series of "pathologies" or "anomalies" that arises from those rearrangements of authority and not from the issue of cultural difference alone.[82])

The underlying *inter-group* (majority-minority) dynamics linked to the creation and subsequent functioning of states arguably helps explain the problematic role of positive human rights obligations benefiting minority or majority identities and their legitimate collective interests, on the one hand,[83]) and the recurrent oscillation between creative institutional exercises in problem-solving and deference to contingent realities, on the other.[84]) More specifically, it tells us that, although in several cases the group's demands can be met by respecting, protecting and fulfilling the rights of persons belonging to the group to their identity, greater forms of protection beyond essential association and cultural rights do *not* automatically derive from identity claims but instead rest on the prioritization of certain interests in human rights discourse. To the extent that group accommodation is primarily designed to mitigate the impact of group-related pathologies that arise from multiple (re-)allocations of sovereign power actively pursued or validated by international law, special protection of national minorities and indigenous peoples can only, relatedly, serve the purpose of remedying or offsetting those pathologies, that is, certain forms of majoritarian (cultural) domination or oppression – such as exclusion from state-formation, forced assimilation, abolition of self-government and/or state-sponsored violence – that have emerged (or might emerge) as a result of those (re-)allocations. International human rights law should actively engage with the legitimate interests of state-wide majorities but should nonetheless situate those interests within a framework of mutual – and mutually proportionate

– inter-group accommodation tied to broader relational processes of self-determination.[85])

What is important is not (or not only) whether any particular form of group accommodation proves acceptable in any particular case but rather the capacity of international human rights law to distinguish claims that are ultimately a (rebuttable) call for certain (re-)configurations of the state from more generic claims that only question the outer limits of particular measures within a state's jurisdiction. Definitional debates and a focus on group status or formal right-holding aspects do not greatly advance matters in that they either obscure the reasons for seeking protection or encourage potentially distorting images of who is (or is not) entitled to such protection. Equally, legal narratives that force the large diversity of groups through the needle's eye of single and self-contained human rights categories (culture/equality) or deconstruct groups into little more than a replaceable set of individuals fail to capture the normative complexities involved or to recognize the distinct legitimacy of core group interests that result from the concrete (direct or indirect) interventions and legacies of international law in matters of decision-making authority. In the wake of remarkable developments in the field, the future of group identities in international human rights law ultimately hinges on illuminating and unpacking what is actually at stake, not on shrouding it in a well-intentioned conceptual fog.

81) *J. Woehrling*, 'Droits', 'liberté' et 'accommodements' linguistiques dans la jurisprudence de la Cour suprême du Canada, in Humanisme et Droit: Ouvrage en Hommage au Professeur Jean Dhommeaux, ed *L. Hennebel* and *H. Tigroudja*, Paris: Pédone, 2013, 447; *J. Woehrling*, Les trois dimensions de la protection des minorités en droit constitutionnel comparé, Revue de droit de l'Université de Sherbrooke 34 (2003–04), 93.

82) A strand of scholarship has, implicitly or explicitly, drawn attention to this key "systemic" or "constitutional" dimension. See eg *N. Berman*, 'But the Alternative is Despair': European Nationalism and the Modernist Renewal of International Law, Harvard Law Review 106 (1993), 1792; *P. Macklem*, *supra* note 59, chs. 5–7; *S. Krasner* and *D. Froats*, Minority Rights and the Westphalian Model, in The International Spread of Ethnic Conflict: Fear, Diffusion, and Escalation, ed *D. Lake* and *D. Rothchild*, Princeton: Princeton University Press, 1998, 227; *C. Reus-Smit*, Individual Rights and the Making of the International System, Cambridge: Cambridge University Press, 2013, 97–105; *J. Nijman*, Minorities and Majorities, in The Oxford Handbook of the History of International Law, ed *B. Fassbinder* and *A. Peters*, Oxford: Oxford University Press, 2012, 100; *C. Bell*, *supra* note 38; *R. Kuppe*, The Three Dimensions of the Rights of Indigenous Peoples, International Community Law Review 11 (2009), 103.

83) See eg the Lautsi case (allowing for a *majority* religious symbol to be maintained in public schools subject to proportionality criteria, *supra* note 14) and the debate over the cultural rights of immigrants (*supra* note 56); see also, in parallel, the limits of ICCPR Article 27 rights of *minorities*, *supra* note 30. For an articulation of aspects of this tension in human rights discourse from a jurisprudential perspective, see *G. Pentassuglia*, *supra* note 9, 248–256.

84) See eg *N. Berman*, *supra* note 82; *J. Nijman*, *supra* note 82; *C. Bell*, *supra* note 82.

85) For fuller human rights-based accounts of self-determination and group autonomy, see *G. Pentassuglia*, *supra* notes 1 and 70.

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